October 5, 1998

VIA HAND DELIVERY

Mary L. Cottrell
Secretary
Department of Telecommunications and Energy
100 Cambridge Street, 12th Floor
Boston, MA 02202

Re: A-R Cable Services, Inc., A-R Cable Partners, Cablevision of Framingham, Inc., Charter Communications, Greater Worcester Cablevision, Inc., MediaOne of Massachusetts, Inc., MediaOne of Pioneer Valley, Inc., MediaOne of Southern New England, Inc., MediaOne of Western New England, Inc., MediaOne Enterprises, Inc., MediaOne of New England, Inc., Pegasus Communications and Time Warner Cable v. Massachusetts Electric Company - D.T.E. 98-52

Dear Secretary Cottrell:

Enclosed please find for filing in the above matter an original and six (6) copies of Massachusetts Electric Company's Reply Brief in the captioned docket.

A certificate of service is also enclosed as well as a diskette containing the electronic version of the enclosures.

Please time and date-stamp the enclosed duplicate copy of this transmittal letter and return to me in the enclosed self-addressed, stamped envelope.

Thank you very much for your assistance.

Yours very truly,

Enclosures
cc: Jeanne L. Voveris, Hearing Officer (3 copies)
Sean Hanley, Rates Division (1 copy)
Mauricio Diaz, Rates Division (1 copy)
Jeffrey Hall, Rates Division (1 copy)
Service List (via FEDERAL EXPRESS)

COMMONWEALTH OF MASSACHUSETTS
DEPARTMENT OF TELECOMMUNICATIONS AND ENERGY

A-R CABLE SERVICES, INC. A-R CABLE PARTNERS CABLEVISION OF FRAMINGHAM, INC. CHARTER COMMUNICATIONS GREATER WORCESTER CABLEVISION, INC. MEDIAONE OF MASSACHUSETTS, INC. MEDIAONE OF PIONEER VALLEY, INC. MEDIAONE OF SOUTHERN NEW ENGLAND, INC. MEDIAONE OF WESTERN NEW ENGLAND, INC. MEDIAONE ENTERPRISES, INC. MEDIAONE OF NEW ENGLAND, INC. PEGASUS COMMUNICATIONS TIME WARNER CABLE Complainants, v. MASSACHUSETTS ELECTRIC COMPANY Respondent.	)	Docket D.T.E. 98-52

REPLY BRIEF OF
MASSACHUSETTS ELECTRIC COMPANY

Thomas G. Robinson, Esq.
Paige Graening, Esq.
Massachusetts Electric Company
25 Research Drive
Westborough, MA 01582

TABLE OF CONTENTS

COMMONWEALTH OF MASSACHUSETTS
DEPARTMENT OF TELECOMMUNICATIONS AND ENERGY

A-R CABLE SERVICES, INC. A-R CABLE PARTNERS CABLEVISION OF FRAMINGHAM, INC. CHARTER COMMUNICATIONS GREATER WORCESTER CABLEVISION, INC. MEDIAONE OF MASSACHUSETTS, INC. MEDIAONE OF PIONEER VALLEY, INC. MEDIAONE OF SOUTHERN NEW ENGLAND, INC. MEDIAONE OF WESTERN NEW ENGLAND, INC. MEDIAONE ENTERPRISES, INC. MEDIAONE OF NEW ENGLAND, INC. PEGASUS COMMUNICATIONS TIME WARNER CABLE Complainants, v. MASSACHUSETTS ELECTRIC COMPANY Respondent.	)	Docket D.T.E. 98-52

REPLY BRIEF OF
MASSACHUSETTS ELECTRIC COMPANY

A. Introduction.

In this brief, Massachusetts Electric Company ("Mass. Electric") responds to the arguments made by the Complainants in their initial brief filed on September 17, 1998 in this proceeding. As we explained in our Initial Brief, the issues in this proceeding are limited to the ratemaking treatment of:

- Appurtenances
- FAS 109
- Usable space, including the worker safety space and the five inches at the top of the pole.

Although the issues are limited, Complainants' argument is not. According to Complainants' brief, one would think that Mass. Electric is engaging in a frontal assault on the Federal Communications Commission ("FCC"), the Department, and the principle of reasoned consistency in administrative decision-making (Complainants' Br., pp. 4, 10-11).

The Complainants have it wrong. Mass. Electric's calculations of the cable attachment rate in this case follows the format and formula used by the FCC and the Department in prior cases. It is based on a simplified cost of service, employing an allocation of usable space on the pole reflecting attachers' pro rata share of the pole costs. Indeed, Mass. Electric follows several established FCC presumptions, including the 15 percent appurtenance factor and the presumptive one foot of usable space for cable attachments.[1/] However, Mass. Electric has taken the opportunity in this, its first litigated pole attachment rate case, to perform relevant calculations correctly and to present important facts and policy issues to the Department.

The Department in its order adopting the pole attachment rate regulations anticipated and invited this approach. In Petition of New England Cable Television Assoc., Inc., Docket D.P.U.

[1/] Mass. Electric has not challenged the presumptive one foot in this proceeding even though the record establishes that 12 inches is the minimum amount of space occupied for cable attachments according to the cable companies' own standards (Tr.1, pp. 71-72, 74-79, Ex. MECO-11), and that their associated appurtenances -- for which they pay no attachment fee whatsoever -- are located within and outside the actual usable space on the pole (Tr. 1, pp. 79-85; Ex. MECO-12).

Compare the Complainants' repeated and incorrect assertions that their pole attachments and equipment use fewer than 12 inches of usable space on the pole (Complainant Br., pp. 12-13). Their contention is based only on the length of their brackets and ignores clearances required by NESC Rule 238 (See Ex. MECO-20, NESC Rule 238) and the Complainants' own construction standards (Ex. MECO-11).

930, p. 15, the Department held as follows:

> The Department has determined not to include any presumptions or otherwise make any substantive findings regarding the calculation of net pole investment, usable space and the annual carrying charge factor. As summarized above, there has been considerable disagreement on these issues and NECTA is still conducting a survey on the usable space issue. It is obvious that any rebuttable presumptions or tentative decisions regarding these issues would be vigorously challenged (possibly by both sides) when a complaint is filed with the Department. Consequently, it would be more appropriate for the Department to consider these issue [sic] in full within the context of a contested case rather than as part of this procedural rulemaking proceeding.

The Department carried this holding forward in *Cablevision of Boston,* yet even there it recognized the possibility that future cases (such as the instant proceeding) might require or justify certain adjustments to the general parameters of the FCC formula:

> By this Order, the Department establishes a method designed to capture the fully allocated costs of aerial pole attachments which is based on, but not precisely identical to, the federal approach being used by the FCC...The Department finds that basing our method for determining aerial pole attachment rates on the federal method is consistent with the Department's earlier decision in *Greater Media*...We depart from the FCC method when additional costs or adjustments to the federal method are justified on state policy grounds, and are consistent with our goal of relying on publicly available data...[T]he Department...is free to depart from the federal approach in the future should circumstances warrant to protect the public interest.

Cablevision of Boston, et al., D.T.E. 97-82 (April 15, 1998) (hereinafter, *Cablevision*), slip op., pp. 18-19.

The Department's approach is sound. Rationally-based presumptions are appropriately used to simplify litigation by establishing guidelines for decision-making. However, a

presumption provides no excuse for an incorrect result. The Department recognized this when it adopted rebuttable presumptions for the pole attachment rate determinations. If a party brings new facts or new policies to the Department, the Department has stated that it will consider and adopt them if the result is more reasonable and fair than the standing presumption (See e.g., *Cablevision* at 43-44). Simplification of litigation or administrative convenience does not justify continuation of presumption that is outmoded, unsupported or simply wrong. The Department should look at the facts and the record in the case, and base its decision on the record. As promised in *Cablevision*, the Department will depart from the FCC method when state policy or the public interest so require. In the same spirit, the Department should not slavishly adopt the perfunctory FCC presumptions when the presumptions are unsupported, unreasonable, or unfair.

B. Calculation of the Rate.

1. Allocation of Appurtenances.

In our Initial Brief, we explained that Mr. Webster did in fact use the FCC- and Department-approved rebuttable presumption to allocate appurtenances (MECO Br., pp. 3-5), and that the 15 percent presumption was reasonable. Specifically, the poles, guys, and anchors in Account 364 that had been unitized represent 83.83 percent of the total unitized plant in Account 364, producing an appurtenance reduction of 16.17 percent (MECO Br., p. 5). This reduction is close to the Department's 15 percent presumption and the use of the presumption avoids the need to argue about what other appurtenances benefit cable subscribers.

In contrast, the Complainants challenged the assumption by making an incorrect calculation. Simply stated, Mr. Glist made no allocation of completed construction which had not

been unitized or classified (included in Account 106) to poles, guys, and anchors. Rather, he added all of that balance to the denominator of his allocation but included only classified plant in the numerator. The result is an "apples and oranges" calculation that by definition overstates the appurtenance disallowance.

In their brief, the Complainants provide no justification for Mr. Glist's incorrect calculation. Rather, Complainants argue that the FCC's 15 percent presumption is designed to be applied only to completed plant that has been classified (Complainants' Br., p. 35). The case cited by the Complainants does not support their own proposition. In *Teleprompter Corp. v. New England Tel. and PSNH*, PA-79-0044, Mimeo No. 002016 (July 14, 1981), the FCC used the 15 percent presumption for New England Telephone total net plant investment (pp. 4-5, n. 6) and performed an allocation of PSNH's non-detailed investment (p. 6), but nowhere articulated that one approach was a tradeoff for the other, as the Complainants suggest.

The Department should not accept the Complainants' erroneous calculation. It should continue to use the 15 percent presumption which has been shown to be reasonable in this case. Alternatively, the Department could make its own calculation of a correct percentage based on the detailed information presented by Mass. Electric in this case, using a reasonable allocation of completed plant not classified. As explained in Mass. Electric's Initial Brief (p. 5, n. 4), the appurtenance reduction would range from a high of 16.17 percent if only guys and anchors were determined to benefit cable companies to a low of 11.95 percent if the investment in pole top pins were recognized in the equation, because pole top pins reduce the number of poles and pole attachment fees for which Complainants must pay (Tr. 1, pp. 135-36). In any event, the incorrect calculation by Mr. Glist should be squarely rejected.

2. FAS 109.

The second flat error in Mr. Glist's calculation focuses on his treatment of FAS 109. As explained in our Initial Brief (pp. 5-6), Mr. Webster eliminated the effects of FAS 109 from his rate calculation; Mr. Glist did not. Mr. Glist simply did not do the adjustment correctly. In their brief, Complainants do not argue that their calculation is correct, but suggest that a correct calculation is too much trouble (Complainants' Brief, p. 41). Simplicity is no excuse for error. Mr. Glist made an error. Mr. Webster's adjustment eliminated FAS 109 effects from the rate calculation. The Department should adopt Mass. Electric's adjustment in its Order.

C. Five-Inch Pole Top.

Complainants distort the facts presented in this proceeding with their argument that the 5-inch pole top to which no party whatsoever attaches is usable space for attachments. Complainants have not offered any evidence of attachments in the top 5-inch zone. Nor have they provided technical data on the ability of poles to withstand attachments in the uppermost five inches. They argue that the top five inches of a pole are usable for attachments despite the fact that no attachment can be made there.

Mass. Electric, on the other hand, has submitted evidence that the 5-inch pole top is physically unusable for any attaching purpose (Ex. MECO-13, p. 11). Wood poles decay due to exposure to sun and rain. Cracks form as a result of expansion and contraction, the normal results of wetting and drying cycles and decay. Attaching any wire, cable, conductor, bolt or appurtenance in the uppermost 5 inches of a pole would accelerate the stress on it, lead to pole

splits and require premature pole replacement, thus raising pole costs for all parties served by poles. Such an extravagant mistake is avoided by treating the 5-inch pole top as unusable space.

Accordingly, the 5-inch pole top is not "available for attachments" as set forth in the Legislature's definition of "usable space". M.G.L.A. c.166 § 25A (1988). The Department should recognize the physical limitations of pole tops and the reasonableness of not permitting attachments in that zone. Accordingly, the Department should define the 5-inch pole top as unusable and allocate its costs to all attachers.

D. Worker Safety Space.

The major issue in this case focuses on the usability of worker safety space for cable attachments. Complainants' contention that the FCC has recently reaffirmed the existing presumptions tells only half the story: In fact, the FCC has stated that it will apply the presumptions *for the time being.* "We will address changing the existing presumptions in the *Pole Attachment Fee Notice* rulemaking ... We reserve decision on issues regarding...the 13.5 ft. presumptive amount of usable space [and] the allocation of the 40-inch safety space..." *Implementation of Section 703(e) of the Telecommunications Act of 1996*, CS Docket 97-151, ¶24 and fn. 100 (Feb. 6, 1998).

Mass. Electric has argued that the space is not usable for CATV attachments if CATV companies do not employ electrically qualified workers and more costly safety equipment than they currently do. Thus, the worker safety space should be eliminated from the usable space component of the pole. Rather, the 40 inch separation between the electrical supply space and the communication space is reasonably maintained for safety purposes and should be supported by all

users of the pole. As explained in Mass. Electric's Initial Brief, the approach is consistent with the pole attachment statute, which defines "usable space" to be "the total space which would be available for attachments... upon a pole above the lowest permissible point of attachment of a wire or cable upon such pole which will result in compliance with any applicable law, regulation or electrical safety code..." M.G.L.A. c. 166 § 25A (emphasis added). Mass. Electric also explained that treating the safety space as unusable space complies with NESC. Finally, Mass. Electric explained that the worker safety space benefits cable companies because it maintains the integrity of the communication space and allows cable companies to use employees who are not qualified to work in the electrical supply space and less-expensive equipment that is otherwise necessary to work on electric conductors.

Despite these facts, the cable companies argue that the space is "usable" and they should not be required to support it. The Complainants base their argument primarily on the Departments' decision in *Cablevision*. However, the cable companies ignore a fundamental distinction between that case and this one. The "unusability" of the safety space was not a major issue in that case. Thus, the Department had no facts before it on which to decide whether the 40 inch separation is "usable" or "unusable" for CATV wire attachments.[2/]

Mass. Electric has put the issue of usability squarely before the Department and has presented strong facts leading to the conclusion that third-party cable attachers benefit from the

---

[2/] The cable companies have argued in Docket DTE 97-95 that Boston Edison is in fact using the worker safety space for communications cable attachments. Mass. Electric has not so used the worker safety space, thus preserving the separation between the electric supply space and the communications space. This different treatment supports a different result. The Department should recognize that when the space is not used for wire attachments, it should be supported by all attachers.

worker safety space.[3/] The worker safety space is not mandated but is allowed by the NESC (Ex. MECO-13, p. 8). A utility that eliminates the separate designation of communication space would force cable companies to use electrically qualified workers and equipment to maintain cable facilities. The trade-off between increased utilization of utility poles and increased maintenance costs for communications workers and equipment presents an immediate and significant issue in this case and Boston Edison's proceeding in Docket D.T.E. 97-95. The Department should recognize in this proceeding that Mass. Electric has continued to maintain the safety space on its poles and treat that space as unusable for other cable or conductor attachments. Accordingly, it should exclude the space from its calculation of the pole attachment rate.

In the event that the Department finds that the space is appropriately usable for cable wire attachments and that the efficient use of pole plant outweighs increased labor and maintenance expenses for communications companies, Mass. Electric will amend its policies to allow cable attachments in the safety space and will file a corresponding reduction in its pole attachment rates for cable companies. Complainants will quickly realize the added costs of more extensive and expensive training for their workers as well as the additional expenses of upgrading their equipment to meet NESC requirements for working in what will become power supply space. To achieve the least-cost, most equitable approach to shared use of poles, the Department should require all parties who attach to the poles to support the safety space that is maintained for their benefit.

[3/]Complainants strain to imply that the NESC Handbook deems the worker safety space a "leg room" benefit for Mass. Electric workers (Complainants' Br., p. 20). Since Mass. Electric linemen routinely work from insulated bucket trucks rather than climbing poles and exposing their legs to CATV attachments, this is a non-issue for Mass. Electric (See also Tr. 1, pp. 118-20).

E. Conclusion.

The Department should recognize Mass. Electric's evidence of the actual costs of third-party attachments to utility poles. Mass. Electric is not suggesting that the Department reject the basic FCC formula. Indeed, Mass. Electric itself has used that formula in developing its proposed rates. Rather, based on the evidence presented in this docket, the Department now can fine-tune the allocation of costs for cable television joint users of poles. This is a much smaller step than the repudiation of Department precedent, which Complainants contend would result.

The Department has been a farsighted and formidable proponent of electric industry restructuring. This proceeding is a direct result of the Department's related interest in regulating distribution companies and in ensuring that electric customers pay for the services they receive without subsidizing non-essential or unregulated ventures. Mass. Electric's rate proposal reflects that objective.

While there may have been some merit to assisting the emerging cable television industry in achieving quick and cheap access to utility poles some twenty years ago, that day is long past. Indeed, as Complainants' witness testified in the Department's recent proceeding on standards of conduct and affiliate transactions:

> We certainly don't perceive ourselves as being an infant industry that requires gracious protection from the Department. The focus of what our concerns are are ... the issues of cross-subsidies, and there's a whole long line of Department precedent where the Department has realized that cross-subsidies do distort competitive markets and should be avoided.

DPU/DTE 97-96, *Investigation by the Department...establishing standards of conduct...,* Hearing Vol. No. 1, Witness R. Munnelly, Tr., pp. 242-43 (Dec. 8, 1997).

In this proceeding, Mass. Electric urges the Department to eliminate the cross-subsidy that captive distribution customers have been providing CATV subscribers. Adopting a more accurate allocation of pole costs more closely reflecting the use each group makes of utility poles will work toward that end. The result will be just and reasonable rates that reflect the actual costs of each pole attacher's presence on utility assets purchased by distribution customers and shareholders. Anything less would result in undue discrimination against distribution customers and favoritism for CATV consumers.

Respectfully submitted,

_____

Paige Graening, Esq.
Thomas G. Robinson, Esq.
Attorneys for Massachusetts Electric Company
25 Research Drive
Westborough, MA 01582
(508) 389-3074

October 5, 1998

Certificate of Service

I hereby certify that I have this day served the foregoing document upon the following person(s):

George B. Dean, Esq.
Chief, Regulated Industries Division
Office of the Attorney General
200 Portland Street
Boston, MA 02114

William D. Durand
Executive Vice President, Chief Counsel
New England Cable Television Association, Inc.
100 Grandview Road
Braintree, MA 02184

Alan D. Mandl
Ottenberg, Dunkless, Mandl & Mandl LLP
260 Franklin Street
Boston, MA 02110

Jeffrey N. Stevens, Esq.
Boston Edison Company
800 Boylston Street
Boston, Massachusetts 02199

Dated at Westborough, Massachusetts October 5, 1998.

Paige Graening

Associate Counsel

Massachusetts Electric Company

25 Research Drive

Westborough MA 01582

(508) 389-3074